STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Jessica R. Cooper, Janet T. Neff and Brian K. Zahra

46th CIRCUIT TRIAL COURT,

Plaintiff, Counter-Defendant,
Third-Party Plaintiff-Appellee,

v

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants, Counter-Plaintiffs,
Third-Party Plaintiffs-Appellants,

and

KALKASKA COUNTY,

Intervening Defendant, Counter-Plaintiff,
Third-Party Plaintiff-Appellant

and

OTSEGO COUNTY,

Third-Party Defendant.

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Supreme Court No. 128878

Court of Appeals No. 254179

46th Circuit (Crawford County)
Court No. 02-5951-CZ

MICHIGAN ASSOCIATION OF COUNTIES' AND MICHIGAN TOWNSHIPS ASSOCIATION'S AMICUS CURIAE BRIEF

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JURISDICTIONAL STATEMENT

On May 3, 2005, the Michigan Court of Appeals issued published opinions in 46th Circuit Trial Court v Crawford County, 266 Mich App 150; ___ NW2d ___ (2005), lv gtd 474 Mich 986 (2005) (Court of Appeals Docket Nos. 254179, 254180, 254181, 254182, 256129 and 257234). Judge Jessica R. Cooper authored the majority opinion, which Judge Janet T. Neff joined. Judge Brian K. Zahra concurred in part and dissented in part in a separate opinion.

On June 14, 2005, Appellants filed timely applications for leave to appeal (Docket Nos. 128878-87). On December 28, 2005, this Court issued an order granting leave to appeal in Docket No. 128878 (COA No. 254179), and inviting the Michigan Association of Counties to file a brief amicus curiae. Proposed amicus curiae Michigan Townships Association has filed an accompanying motion to join in this brief. This Court has jurisdiction to review this case by appeal. MCR 7.301(A)(2); MCR 7.302(G).

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COUNTIES ENTER INTO A FUNDING CONTRACT WITH THE TRIAL COURT TO FUND PENSION AND HEALTH CARE BENEFITS AT A SPECIFIC LEVEL?

Plaintiff-Appellee 46th Circuit Court (the "Trial Court") answers:	Yes
Defendants-Appellants Crawford County, Crawford County Board of Commissioners and Kalkaska County (collectively, the "Counties") answer:	No
Judge Kolenda answered:	Yes
The Court of Appeals majority answered:	Yes
Judge Zahra, dissenting, answered:	No
Amici Curiae Michigan Association of Counties and Michigan Township Association answer:	No

II. DOES THE RECORD SUPPORT THE CONCLUSION THAT THE LEVEL OF FUNDING OFFERED BY THE COUNTIES WAS INSUFFICIENT TO ALLOW THE TRIAL COURT TO FULFILL ESSENTIAL COURT FUNCTIONS?

Plaintiff-Appellee Trial Court answers:	Yes
Defendants-Appellants Counties answer:	No
Judge Kolenda answered:	Yes
The Court of Appeals answered:	Yes
Amici Curiae Michigan Association of Counties and Michigan Township Association answer:	No

III. DOES THE RECORD SUPPORT THE CONCLUSION THAT ENHANCED PENSION AND HEALTH CARE BENEFITS WERE REASONABLE AND NECESSARY TO ACHIEVE THE TRIAL COURT'S CONSTITUTIONAL AND STATUTORY RESPONSIBILITIES, AND THAT THE COURT'S FAILURE TO OBTAIN SUCH BENEFITS SO AFFECTED EMPLOYEE MORALE, OR THE COURT'S ABILITY TO RETAIN OR HIRE COMPETENT EMPLOYEES, THAT THEY WERE REASONABLE AND NECESSARY TO ACHIEVE THE COURT'S CONSTITUTIONAL AND STATUTORY RESPONSIBILITIES?

Plaintiff-Appellee Trial Court answers:	Yes
Defendants-Appellants Counties answer:	No
Judge Kolenda answered:	Yes
The Court of Appeals answered:	Yes
Amici Curiae Michigan Association of Counties and Michigan Townships Association answer:	No

INTRODUCTION

On May 3, 2005, the Michigan Court of Appeals issued published opinions in 46th Circuit Trial Court v County of Crawford, 266 Mich App 150; ___ NW2d ___ (2005), lv gtd, 474 Mich 986 (2005). Judge Jessica R. Cooper authored the majority opinion, which Judge Janet T. Neff joined. Judge Brian K. Zahra concurred in part and dissented in part in a separate opinion.

Amicus curiae Michigan Association of Counties ("MAC") is a non-profit organization representing the interest of the 83 counties in Michigan. Proposed amicus curiae Michigan Townships Association ("MTA") is a Michigan non-profit corporation with a membership consisting of more than 1,200 townships throughout Michigan. On behalf of Michigan counties and townships, MAC and MTA submit this brief addressing the issues on which this Court granted leave to appeal, and request that the Court grant relief correcting and clarifying the law.[1]

STATEMENT OF FACTS

MAC and MTA support Appellants Crawford and Kalkaska Counties' (the "Counties") position and concur in the Statement of Facts set forth in their brief. The argument below will discuss specific facts that are best viewed in context.

STANDARD OF REVIEW

This brief discusses issues of law. Appellate courts review legal issues de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991). The Court's order granting leave to appeal indicates that the Court will review the evidence de novo in light of the applicable law.

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[1] At the application stage, MAC submitted a brief that also addressed attorney fee issues. MAC and MTA do not address those issues in this brief, due to the nature of the Court's order granting leave to appeal. The attorney fee issues remain important to counties and townships, however, and MAC and MTA stand ready to provide any additional briefing that the Court requests.

ARGUMENT

Although this Court's order granting leave to appeal may have suggested an order of analysis by listing three issues, MAC and MTA address the contract issue first due to the nature of this case. There was no actionable problem with the Trial Court's level of funding or retirement benefits in the first place. Instead, this case involves a sequence that essentially boils down to (1) the Trial Court wanted enhanced retirement benefits for its employees, and promised to deliver those enhanced benefits based on an alleged contract with the Counties, (2) which led to the Trial Court's assertions that if it did not deliver the enhanced benefits, then its employees' morale would suffer, (3) which led to the Trial Court's assertion that the allegedly reduced morale would allegedly result in lower productivity, which allegedly would impact the Trial Court's ability to perform its essential functions. Therefore, it is appropriate to first consider that there was no contract.

I. THE COUNTIES DID NOT ENTER INTO A FUNDING CONTRACT WITH THE TRIAL COURT.

The Court of Appeals' majority held that the Counties were contractually bound to provide a retirement benefits package for court employees and judges through Board resolutions that neither the Boards, nor their successors, could amend or repeal. The Court of Appeals' decision conflicts with Studier v Michigan Public School Employees' Retirement Board, 472 Mich 642; 698 NW2d 350 (2005), where this Court held that a statute did "not create for public school employees a contractual right to receive health care benefits." 472 Mich at 668. The Court is undoubtedly aware of its own reasoning, but it bears repeating since it provides direct guidance for overturning the Court of Appeals' decision. The Studier Court explained:

> "Of primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation. Therefore, a fundamental principle of the jurisprudence of both the United States and this state is that one

> legislature cannot bind the power of a successive legislature. We recently reiterated this principle at length in LeRoux v Secretary of State, 465 Mich 594, 615-616; 640 NW2d 849 (2002), quoting Atlas v Wayne Co Bd of Auditors, 281 Mich 596, 599; 275 NW 507 (1937):
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> > "'The act of one legislative body does not tie the hands of future legislatures. *Cooper, Wells & Co v City of St Joseph*, 232 Mich 255 [205 NW 86 (1925)]. The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors . . . . [Additionally,] [o]ne legislature cannot enact irrepealable legislation or limit or restrict its own power, or the power of its successors, as to the repeal of statutes; and an act of one legislature is not binding on, and does not tie the hands of, future legislatures.'" (Studier, supra, 472 Mich at 660, footnote omitted).

The Studier Court further explained that exceptions to the principle that a legislative body may not bind its successors are "subject to strict limitations that have developed in order to protect the sovereign prerogatives of state government," and that "[a] necessary corollary of these limitations that has been developed by the United States Supreme Court, and followed by this Court, is the strong presumption that statutes do not create contractual rights." Studier, supra, 472 Mich at 661 (citing Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co, 470 US 451, 456-66; 105 S Ct 1441; 84 L Ed 2d 432 (1985); In re Certified Question (Fun 'N Sun RV, Inc v Michigan), 447 Mich 765, 777-78; 527 NW2d 468 (1994)).

Fundamentally, legislators make laws that establish governmental policy, not contracts. Unless statutory language plainly indicates that a legislative body intended to bind itself contractually, courts should not construe that language as creating private contractual rights. Studier, supra, 472 Mich at 661-62 (citing and quoting United States and Michigan Supreme Court cases).

This Court further recognized federal authority expressing even greater reluctance to infer a contractual obligation where legislation has not explicitly precluded amendment of a public-employee pension benefit plan. Studier, supra, 472 Mich at 662-63 (citing Nat'l Ed Ass'n Rhode Island v Retirement Bd of the Rhode Island Employees' Retirement System, 172 F3d 22, 27 (CA 1, 1999). This Court explained:

> "**This reluctance stems not only from the caution against finding an implied surrender of legislative power, but also from the realization that legislatures frequently need to utilize that power to modify benefit programs and compensation schedules.** *Id.* Further, this reluctance is grounded in the realization that 'it is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries (e.g., those who have retired).' *Id.* at 27-28 (citations omitted)." (Studier, supra, 472 Mich at 663, emphasis added).

This Court followed the authorities outlined above, holding that the plaintiff public school retirees "failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering into a contractual agreement to provide retirement health care benefits to public school employees when it enacted MCL 38.1391(1)." Studier, supra, 472 Mich at 663. This Court explained that if the Legislature had intended to surrender its legislative powers through the creation of contractual rights, then the Legislature would have done so expressly. Id. at 663-65. Thus, the Legislature did no more than what its predecessors had done – "set forth a policy to be pursued until one of its successor legislators ordained a new policy." Id, at 665-66 (citing Nat'l R, supra, 470 US at 466). Similarly, the County Boards' resolutions at issue merely set forth County policy that could be amended or repealed.

This Court's order granting leave to appeal does not inquire about evidence with respect to the contract issue (in contrast to the funding and benefits issues), appropriately reflecting the legal nature of this issue. The Court does ask, however, whether there was a contract to fund pension and

health care benefits at a "specific level." The Court's inquiry is insightful, since the various resolutions (e.g., Apx 673a, 1840a), partially signed agreement (Apx 831a-49a; Crawford County refused to sign), and testimony of witnesses is anything but a model of a "meeting of the minds" (even assuming that a contract could be formed under traditional contract principles; see, for example, Tr 572-73, 676, 680-81 (copy attached), 684 (Apx 1544a-45a, 1561a, 1563a) regarding unresolved issues, and Tr 555, 699 (Apx 1540a, 1567a) regarding negotiations subsequent to the alleged contract).[2]

The Circuit Court's attenuated reasoning, which the Court of Appeals affirmed (2-1), is a "stretch" under any contracted analysis, and completely inappropriate in this context of legislative action. For example, Crawford County's August 29, 2000 resolution regarding health care benefits was simply to "authorize" the County to make payments of $4,087.00. Nevertheless, the Circuit Court found that there was a binding contract and that the "correct" figure was $5,763.00 based on subsequent and imputed knowledge that was not reflected in any resolution (July 25, 2003 Opinion, pp 10-11, findings 27-28, Apx 44a-45a). Crawford County's August 29, 2000 resolution regarding pension benefits did not even "authorize" the County to make any payment, but instead was a "request" that the Circuit Court convoluted into a specific agreement (July 25, 2003 Opinion, p 12, findings 32-35, Apx 46a). If Crawford County had intended to surrender its legislative powers by entering into a contract (let alone a contract "to fund pension and health benefits at a specific level," as this Court inquired), then Crawford County would have done so expressly. Studier, supra, 472 Mich at 663-65. Crawford County did not do so. Without Crawford County's agreement, there appears to be no basis for the alleged existence of the alleged pension/health care contract.

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[2] The Counties' Appendix is cited where possible. The additional pages of trial transcript cited in this brief are attached.

This is a statewide issue that is extremely important to MAC, MTA, and their member counties and townships, since it concerns how county resolutions throughout Michigan will be construed. MAC and MTA's position is in accordance with the well-established United States and Michigan Supreme Court precedent and principles reflected above. County resolutions establish county policy that may be amended or repealed. If a county intends to enter into a contract, then the county will do so expressly.

The Court of Appeals majority ignored the controlling law and principles, and instead reasoned that a county board must be able to enter into long-term contracts in order to do business. 46th Circuit Trial Court, supra, 266 Mich App at 162 (citing Harbor Land Co v Gross Ise, 22 Mich App 192; 177 NW2d 176 (1970)). The Court majority's reasoning is flawed because it is based on the incorrect premise that the purported contract concerned a business or proprietary matter. See generally, Harbor Land Co, supra, 22 Mich App at 205-206 (explaining that, in the exercise of a municipality's business or proprietary powers, a municipal board may enter into a contract binding successor boards with respect to water supply, flood prevention, sewage disposal and similar matters); Iverness Mobile Home Community, Ltd. v Bedford Twp, 263 Mich App 241, 248; 687 NW2d 869 (2004) ("while a township board may, by contract, bind future boards in matters of a business or proprietary nature, a township board may not contract away its legislative powers;" holding that consent judgment providing for future actions impermissibly contracted away legislative powers).

Public employee retirement benefits do not fall under the business/proprietary reasoning used by the Court of Appeals majority. Studier, supra; Nat'l Ed, supra, 172 F3d at 27 (Noting that "legislatures regularly modify compensation schedules and benefit programs," and further discussing precedent upholding pension reductions, and policy reasons to protect legislative power).

The Court of Appeals majority's further suggestion of a possible implied contract (266 Mich App at 162, n 20) is similarly flawed because the Court again misapplied principles concerning private contracts to public benefits. The majority's suggestion regarding equity never arises; instead: "It is fundamental that those dealing with public officials must take notice of the powers of the officials." Johnson v City of Menominee, 173 Mich App 690, 693-94; 434 NW2d 211 (1988) (holding that employment contract was not binding on city). See also, Stittler v Bd of Control, 333 Mich 681, 687; 53 NW2d 681 (1952); City of Hazel Park v Potter, 169 Mich App 714, 719-23; 426 NW2d 789 (1988).

No further contractual analysis is necessary, but it bears noting that Judge Zahra, dissenting in part, correctly recognized that the Counties could not enter into a contract with the Trial Court to fund something that they had a preexisting duty to fund. 266 Mich App at 183-87. Counties have a duty to fund circuit courts under MCL 600.591(1), which states:

> "The county board of commissioners in each county shall annually appropriate, by line-item or lump-sum budget, funds for the operation of the circuit court in that county. However, before a county board of commissioners may appropriate a lump-sum budget, the chief judge of the judicial circuit shall submit to the county board of commissioners a budget request in line-item form with appropriate detail. A court that receives a line-item budget shall not exceed a line-item appropriation or transfer funds between line items without the prior approval of the county board of commissioners. A court that receives a lump-sum budget shall not exceed that budget without the prior approval of the county board of commissioners."

Judge Zahra explained:

> "'A pledge to undertake a preexisting statutory duty is not supported by adequate consideration.' *Gen. Aviation, Inc* v *Capital Region Airport Auth (On Remand)*, 224 Mich App 710, 715; 569 NW2d 883 (1997). Because the Counties had a preexisting duty to appropriate funds for the retirement plan, this duty could not provide adequate consideration for any alleged contractual relationship. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 525; 529 NW2d 318 (1995). Further, the Trial Court could not offer the Counties anything in exchange for

> the Counties providing funding beyond that required by statute. The funding of the trial courts is not a bargained-for exchange subject to contract principles, but is a statutory obligation for the funding units and a constitutional right for the courts. Because the alleged contract between the Trial Court and the Counties lacked consideration, plaintiff's contract claims must fail." (266 Mich App at 185-86, omitting footnote further explaining that no contract could be implied).

The proper interpretation of county resolutions, and the preservation of legislative power for successive county boards, are crucial matters of statewide importance. The Court of Appeals reversibly erred by failing to apply, or even recognize, controlling precedent. The Court of Appeals' published decision radically departs from well-reasoned principles applied by this Court in Studier, and should not be allowed to dictate erroneous results in future cases.

II. THE TRIAL COURT HAD SUFFICIENT FUNDING TO FULFILL ITS ESSENTIAL FUNCTIONS.

The Court's inquiry about the Trial Court's level of funding suggests an issue that is separate from the funding of pension and health care benefits. The parties' dispute, however, focused on enhanced retirement benefits, and the record does not support a stand-alone level-of-funding problem. When the Trial Court was formed in 1996, it had 64 employees and was to proceed with the expectation of reducing them to achieve the goal of reducing operating costs. By mid-2000 (when the events leading to this litigation essentially began), the court had only reduced its employees by four - to 60 (Tr 230; copy attached).[3] The Trial Court's budget was increasing at the average rate of 5.8% per year (Tr 602; Apx 1552a). Hostilities developed between the Trial Court and Crawford County, in particular, leading the court to simply reject Crawford County's position

[3] In contrast, Crawford County had 20 employees in 1997 and 12.5 emloyees in 2002 (Tr 624; Apx 1554a), with its road patrol reduced from 9 to 5 employees (Tr 625; Apx 1555a; see also, Tr 627, 653; Apx 1557a, 1559a). Court employees received a 4% wage increase every year since 1996, while Crawford County employees' wages were frozen (Tr 816; Apx 1575a).

and not try to make any requested budget cuts (Tr 271, 412-14 (copy attached), 415-17, 423; Apx 1458a, 1501-03a, 1509a). Judge Alton Davis[4] may have been unaware of Crawford County's financial circumstances (Tr 422; Apx 1508a), and took the position that if something was not required as part of the alleged contract (discussed above), then "it didn't get cut" (Tr 428-29; copy attached).

The Trial Court did manage to cut costs in 2002 (Tr 113-15; Apx 1418a-20a) in response to a request from Otsego County, which the court viewed more favorably than Crawford County (Tr 420-23; Apx 1506a-09a). The Court still fulfilled its mandated functions (Tr 276; Apx 1463a) and did not have a problem in processing civil or criminal matters (Tr 219; Apx 1453a). Judge Davis testified that, at the time of trial, the Trial Court "can still do its job and do it effectively" (Tr 314; Apx 1474a). The Trial Court's Co-Administrator, Rudi Edel, testified that the Court maintained and sought non-mandated functions (Tr 111-12, 277-78; 1416a-17a, 1464a-65a). The Trial Court proposed an 11.7% budget increase for 2003, which was disproportionately large particularly in light of the Counties' ability to pay (Tr 1380-81; Apx 1616a-17a). Thus, the record does not support a conclusion that essential court functions would be unfulfilled based on the level of funding. The parties' dispute appears to focus on retirement benefits, as further discussed below.[5]

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[4] Judge Davis was the Chief Judge of the Trial Court at all relevant times in this case. On July 14, 2005, Governor Granholm appointed him to the Michigan Court of Appeals.

[5] Of course, employee compensation consists of a "package" containing both wages/salary and benefits. Both have to be funded. A reduction in one could be offset by an increase in the other. There is considerable recent focus on reducing expensive retirement and healthcare benefits (see, for example, Tr 1388, 1394-95, 1407-14; Apx 1620a, 1623a-24a, 1631-39a). Therefore, much of the discussion regarding retirement benefits is also applicable to the separately-identified (or broader) funding issue.

III. ALLEGATIONS REGARDING EMPLOYEE MORALE BASED ON EXPECTATIONS OF ENHANCED RETIREE BENEFITS DO NOT SUPPORT THE TRIAL COURT'S ASSERTION OF ITS INHERENT POWER TO OBTAIN ADDITIONAL FUNDING FROM THE COUNTIES.

The constitutional doctrine of inherent power is well established. This Court has never fully articulated standards and circumstances for applying the doctrine, however. As a result, the Court of Appeals improvidently expanded the doctrine through a published decision that should not be allowed to stand as precedent for the resolution of future cases. The law needs to be corrected and clarified.

Twenty years ago, this Court's Justices agreed "that an inherent power analysis is implicated **when judicial functions are in jeopardy**." Employees and Judge of the Second Judicial Circuit Court v Hillsdale Co, 423 Mich 705, 724; 378 NW2d 744 (1985) ("Hillsdale", emphasis added). The majority declined to further elaborate in the absence of what it considered to be a proper record. Id at 725. Justice Riley, dissenting, joined by Chief Justice Williams and Justice Ryan, offered the following commentary:

> "Thus, to lay a foundation for establishing a procedure for the trial courts of Michigan to compel funding, I would hold that the court has the inherent power to compel funding for **reasonable and necessary expenditures for court operations** but that **this power cannot be broader than the established need which compels its exercise**.
>
> * * *
>
> Having established this foundation, I would hold that, when accord cannot be reached with the legislative funding authority, the court should initiate suit and bear the burden of proving that its appropriation request is reasonable and necessary to the court's operation. I would caution that **to be reasonable and necessary the need must not only be practical rather than relative, but it must be shown that the funds are needed for the effective administration of justice.** The trial court's opinion should set forth specific findings of fact, identifying those judicial functions that will be in jeopardy if the appropriation requested is denied, and

> conclusions of law indicating why the function is required by the constitution. 423 Mich at 743-44 (emphasis added, footnote omitted).

Further guidance is provided by Judges for the Third Judicial Circuit v Wayne Co, 383 Mich 10, 32-33; 172 NW2d 436 (1969), where Justice Black, with Justice Dethmers concurring, opined that a court's inherent power to obtain funding "must be cautiously exercised," and concerns whether the court "functions serviceably as a co-equal branch of Michigan's government." In Judges for the Third Judicial Circuit v Wayne Co (On Rehearing), 386 Mich 1, 8-9; 190 NW2d 228 (1971), this Court adopted the opinion of Justices Black and Dethmers. In Wayne County Prosecutor v Wayne Co Bd of Comm'rs, 93 Mich App 114, 124; 286 NW2d 62 (1979), the Court of Appeals defined "serviceability" as follows:

> "We adopt "serviceability" as the standard to be applied in determining whether the Board of Commissioners has unlawfully underfunded the county executive officers, so that they are unable to fulfill their statutory obligations. **Serviceability must be defined in the context of Justice Black's opinion, i.e. "urgent," "extreme," "critical," and "vital" needs**. A serviceable level of funding is the minimum budgetary appropriation at which statutory mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. **A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out**. A function funded below a serviceable level, however, will not be fulfilled as required by statute." (emphasis added).

The Court of Appeals appropriately recognized these standards (266 Mich App at 164-65), but did not apply them correctly. Instead, the Court created new law with the theory that (1) the Trial Court needed funding for a retiree benefits package, or (2) court employee morale would drop, which in turn would (3) reduce employee productivity, which in turn would (4) jeopardize the Trial Court's ability to function. 266 Mich App at 166. This reasoning from "funding" to "jeopardy" is plainly

attenuated, and contains the faulty premise that funding decisions can be driven by court employees not feeling like working.

Certainly, courts must function. Therefore, for example, if budget cuts result in too few employees doing too much work, there is objective evidence of possible jeopardy to judicial functions. See, Wayne Co Prosecutor, supra, 93 Mich App at 124-26 (analyzing whether various departments were serviceably funded under a reduced budget, by considering positions being lost and the workload of remaining employees).

This is not such a case. There is no sound basis for a conclusion that essential court functions would not have been accomplished if court employees had not received enhanced retirement benefits. Instead of applying the law, the Court of Appeals accepted the theory that court employees have a psychological need or desire to eventually receive enhanced retirement benefits after they stop working, and to have those benefits retroactively increased for work already performed, otherwise they will do less work. This theory is contrary to law and sound policy. Court employees can do the work and, like any other employees, must do the work for which they are paid, which is the standard under the law. Even under Justice Riley's proposed standard, there must be a demonstrated need. Here, in contrast, increasing retirement benefits might be reasonable, at best (from a social welfare perspective), but plainly is not necessary. Increasing retirement benefits could even be counterproductive, by encouraging experienced Court employees to retire sooner due to the availability of enhanced benefits.

The record indicates that the Trial Court was functioning at a serviceable level (as indicated above), and does not indicate any initial problem (morale or otherwise) with benefits from the court employees' viewpoint. Instead, following the employees' defeat of a unionization drive, Judge Davis sought to address what he viewed as "two glaring deficits," which he described as follows:

> Number one, we have not a good pension circumstance with the MERS pensions that are afforded to the court people. Plus they are different county to county and I want unification there. I mean that's our goal. I want everything to be the same. There's no reason for difference. And so **what I want from you is the best MERS plan that's available, which I understand to be a MERS B4/E2**.
>
> The second thing that is a glaring problem -- it's a problem for everybody; the newspapers are full of it all the time -- is there's no provision for these people when they leave work for any kind of healthcare. They're just on their own. And that's a problem. It's a problem in attracting people. It is a double-edged sword in this respect: In all the time I've been involved in county government, I've seen circumstances where people who have -- who should go because they're tired, they're worn out, they're sick -- whatever it is, they should go; don't go because this is the only place that they can get their medical benefits. And if they leave, they're in trouble. Okay? So **I want some kind of medical retirement plan** for these people. (Tr 342-43; Apx 1476a-77a, emphasis added).[6]

Although Judge Davis' paternalistic goals may be laudable, they concerned taking better care of employees after they stopped working, and providing for (or encouraging) older employees to stop working. There is no need, nor requirement, for the Counties to fund the Court's "post-retirement welfare plan" (Tr 1416-17; Apx 1639a-40a). Judge Davis' focus on enhancing Trial Court benefits also ignored the totality of employee issues, and worked to the detriment of County employees (e.g., Tr 409-10; Apx 1499a-1500a)

Judge Davis testified that he put together a proposal that included his two priorities. He presented it to the court employees in the Summer of 2000. The court employees had some questions, but generally agreed that Judge Davis should: "Go ahead and -- and see if you can get it done" (Tr 355; Apx 1489a). So he did, leading to the County resolutions, as discussed above. Judge

[6] Mr. Edel confirmed that "it was the chief judges [sic] goal to attempt to improve the health benefits and the retirement - the MERS benefits for retirees" (Tr 133, copy attached). At that time, no trial court employee participated in a B4 retirement plan (Tr 266; Apx 1456a). Judge Davis wanted the best benefit available for court employees, and did not concern himself with the cost (Tr 400-401; Apx 1494a-95a).

Davis testified that he thought that he had a deal with the Counties (Tr 351; Apx 1485a), and that he told the court employees "for the good of the order and to accomplish for all of you the hope of some stability in your retirement, I just strongly recommend it" (Tr 354; Apx 1487a).

The Trial Court's Co-Administrator, Rudi Edel, testified that there was no initial problem with morale, but instead morale was "especially high," and allegedly was impacted only by Judge Davis' inability to deliver the enhanced retirement benefits that he proposed and promised:

> "Initially court reform and the changes in the jobs and the shifts in the personnel policies where there was a give and take created a morale problem. Over time that problem went away and, in my opinion, morale was high especially after the three counties agreed and passed the retirement: the B4 and the retirement health fund. Morale since then has really plummeted again after Crawford County has refused to provide appropriate funding as they agreed to in June of 2000 (Tr 97; Apx 1413a).[7]

The Trial Court's morale allegations must be viewed in this context - not as an initial problem, but instead as a problem created by the Court itself (even assuming there was any problem that might have actually affected Court operations to a constitutional degree). Judge Davis testified that court employees were aware of this dispute regarding the enhanced retirement benefits (Tr 357; Apx 1491a) and that the employees had to receive those benefits, because otherwise "[m]y ability to lead would evaporate," and he expected that other judges would be similarly affected, and that employees would leave the court (Tr 358; Apx 1492a). The record indicates, however, that no employee left the Court to obtain a better retirement plan or better retiree health insurance (Tr 285; Apx 1469a), nor could any specific employee be identified as potentially leaving (Tr 358; Apx 1492a).

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[7] See also, Tr 534 (copy attached) regarding employee excitement and happiness over increased benefits that Judge Davis proposed. Mr. Edel's reference to an agreement in June of 2000 appears to have no basis.

Judge Davis was well aware of Crawford County's objections. The Trial Court and Counties were unable to agree (see the discussion in Argument I). Despite the ongoing controversy, Judge Davis ordered the enhanced retirement benefits through a December 4, 2000 implementation order (Apx 721a-23a). That same order directed implementation of the employee "concessions" that the Trial Court has asserted to be the "quid pro quo" for the enhanced retirement benefits at issue (Id, see also, Tr 355; Apx 1489a). There is no sound basis to hold the Counties responsible for the effects (morale or otherwise) of the Court's own actions.

The constitutional requirement is need, and the unavoidable "bottom line" is that the court employees did not need the enhanced retirement benefits that Judge Davis proposed and promised to them. There simply is no constitutional requirement for counties to provide funding to support a court's paternalistic goals, nor remedy a court's self-created labor/management problem.

Moreover, public employee retirement benefits are inherently subject to change, as explained above and recognized in Studier, supra. The Court might also take judicial notice of dramatically rising health care and retirement costs, and the resulting necessary changes in both public and private benefit plans. Under the Court of Appeals' reasoning, however, court pension and health care benefits could never be reduced, but instead would become a perpetual entitlement because otherwise the employees would feel bad and work less.[8]

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[8] Such a perpetual entitlement for court employees' benefits, regardless of financial circumstances, would extend even beyond the constitutional protection of judges' salaries. Const 1963, art 6, §18 relevantly provides:

"Salaries of justices of the supreme court, of the judges of the court of appeals, of the circuit judges within a circuit, and of the probate judges within a county or district, shall be uniform, and may be increased but shall not be decreased during a term of office except and only to the extent of a general salary reduction in all other branches of government."

Judicial funding cases should not be insulated from the economic forces that impact taxpayers' lives, nor be driven by self-serving, or self-created, allegations regarding employee morale. As the Hillsdale majority recognized:

> "An assertion of judicial power ultimately rests on the consent of thoughtful citizens . . . Public belief in the propriety, fairness, and justice of our decisions is essential." (423 Mich at 724).

Public confidence in the courts cannot be sustained where courts are viewed as bestowing special benefits on themselves at the expense of the communities that support them. Court employees work side-by-side with county employees, and should not be exempt from the financial constraints that affect county employees. Judge Davis acknowledged that county employees having lower wages and benefits than court employees "probably is a source of resentment and some problems," but took the position that "they're not employees and that's not my business" (Tr 409-10; Apx 1499a-1500a).

The Court of Appeals has opened the door for courts to zealously advocate their own interests, without regard to the interests and abilities of funding units. This type of judicial funding litigation is contrary to community standards and common sense,[9] If left uncorrected, this case will undermine the public's confidence in the courts and reduce the ability of counties to serve the public, while usurping the counties' legislative authority in contravention of Const 1963, art 3, §2. Accordingly, this Court should correct the Court of Appeals' departure from the standards that have been recognized and applied in prior inherent power and public employees benefits cases, and to clarify the law to provide guidance in future cases.

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[9] For example, police ticket and apprehend criminal suspects who then may have their day in court. There is no need to maintain court capacity to handle criminal matters, however, to the extent that a police force is reduced or eliminated due to the lack of available funds, as Crawford County's road patrol has been (Tr 625, 627; Apx 1555a, 1557a; see also Tr 276; Apx 1463a confirming court fulfillment of mandated functions with caseload reduction).

RELIEF

The Michigan Association of Counties and Michigan Townships Association respectfully request that the Court consider this brief in its disposition of the appeal in Docket No. 128878; reverse the Court of Appeals decision; and correct and clarify the law through an opinion holding that (1) county resolutions for funding employee benefits do not contractually bind counties; and (2) a court's inherent power to obtain funding for judicial functions that are in jeopardy must be supported by objective evidence of judicial functions not being accomplished (for example, due to the elimination of positions that increase the workload of remaining employees to a level where essential functions cannot be accomplished) and cannot be based on allegations regarding employee morale, particularly where any morale issue (assuming it exists) arose from the court's own actions.

Respectfully submitted,

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Dated: February 15, 2006

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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Jessica R. Cooper, Janet T. Neff and Brian K. Zahra

46th CIRCUIT TRIAL COURT,

Plaintiff, Counter-Defendant,
Third-Party Plaintiff-Appellee,

v

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants, Counter-Plaintiffs,
Third-Party Plaintiffs-Appellants,

and

KALKASKA COUNTY,

Intervening Defendant, Counter-Plaintiff,
Third-Party Plaintiff-Appellant

and

OTSEGO COUNTY,

Third-Party Defendant.

/

Supreme Court No. 128878

Court of Appeals No. 254179

46th Circuit (Crawford County)
Court No. 02-5951-CZ

ATTACHMENTS TO MICHIGAN ASSOCIATION OF COUNTIES' AND MICHIGAN TOWNSHIPS ASSOCIATION'S AMICUS CURIAE BRIEF

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all of their retirement would go just to the premiums of healthcare. And the only thing they'd have to live on is what they have in the bank. And there may be other reasons that I'm not aware of right now but -- that the chief judge had. So based on all of that in general discussions, it was the chief judges goal to attempt to improve the health benefits and the retirement -- the MERS benefits for retirees.

Q All right. Now, there has been information placed on the record, and in fact findings made concerning meetings in the summer of 2000. And I don't want to spend a lot of time on that, but -- and we'll have some exhibits I think that memorialize certain things that occurred. But if you can just quickly take us through the summer of -- of 2000 through the fateful August 29 meeting. And then I think we can get to some exhibits and hopefully have you identify, and then we introduce some.

A Okay. First of all, Antrim County left the picture, which created a hole for a control unit and jeopardized the health insurance for active employees. So that was the start. May of 2000 the court met with the tri-county board, which is representatives from all three counties, to discuss the control unit issues, to discuss the healthcare issue; and how do we function as a -- as a tri-county unit for a unified court? How do you pay for the court, et

off two employees and canceled a contractual agreement with a part-time probation person, which then further reduced cost in the line items for wages and fringe benefits.

Q Okay. Let's back up though because I'm a little bit confused. When you identified the point in time at which you had 64 employees on staff, what point was that?

A May of '96.

Q May of '96?

A At the moment that we merged into a trial court, it was 64.

Q So that would be all of the employees from the district court and probate court and these various courts that were coming together in a merger.

A Yes, ma'am.

Q So would one look at that as an all time high that the Supreme Court had identified as being subject to a reduction of operational costs? We would expect to move down from 64 consistent with the goal that was given you as a direction; correct?

A Over the course of time, sure.

Q Okay. And you did, in fact, then move down from 64 to 60; is that correct?

A Over the course of time. By June -- we'll say May/June of 2002 we had 60 employees.

Q So over the course of six years you were able to pare it down by four employees?

Q -- second paragraph he cites some numbers.
A Okay. Yes.
Q On the third page on the top paragraph he states, "We sincerely hope that as a result of your review there will be no deficit for court operations at all for the fiscal year 2001." My question is, Judge Davis: What, if anything, did you initiate in response to your receipt of this correspondence?
A I'm not certain. I -- I think that we had meetings with the commissioners. There may have been correspondence from this. I didn't agree with him, and he was -- you know, setting up a circumstance that -- that was not going to get any better, and I think that we -- we proceeded to try and see what we could do about it.
Q And that's my question. Exactly and precisely what did you proceed to do about it?
A I can't tell you precisely and exactly from my memory. My recollection is, and this letter would suggest, that what we did was commence to communicate by one method or another that we didn't accept the premise that these numbers weren't going to work, and you couldn't say: Well, here it is. We hope you don't have a deficit, because we have a deficit.
Q Did you make any cuts to the court's budget or expenditures in response to your receipt of this correspondence?

A Specifically as a result of this letter?
Q Yes.
A I don't -- I don't think so.
Q I'm going to direct your attention to the next consecutive exhibit, 14. Do you recall receiving the October 31 memo regarding budgetary adjustments from the Crawford controller?
A Not specifically, but we rather periodically and routinely get these from Mr. Compo. When they are addressed to department heads I'm never certain they refer to the court or that he intends to include us.
Q Let me direct you just a few tabs back to Exhibit 246 under tab 21.
A A few tabs back.
Q Just a few tabs back consecutively.
A Going forward?
Q Yeah.
A Yes.
Q That would be correspondence dated December 5, 2001 addressed to you and the boards of commissioners of Otsego and Kalkaska?

(At 1:43 p.m., DX #246 identified)

A Okay.
Q Do you recall receiving the expense budget as approved by Crawford for the court?

A I --
Q Do -- do you recall receiving this correspondence?
A Well, specifically, no; but it's got me on it so I'm assuming that, yes, indeed I did. I wouldn't say I didn't. I think I probably did.
Q At paragraph two of his correspondence Mr. Compo states:

> "This represents the amount of funding the Crawford Board of Commissioners appropriated for the court system so that the courts may fulfill their mandatory obligations. This is less than the amount requested, however it does represent a 2.5 percent increase over the amount appropriated by the board for the previous year."

What, if any, cuts did the court implement in its budget as a result of receiving this correspondence?
A From this letter?
Q From this letter or at any time in response to letters received to like effect during this period of time --
A We --
Q -- from Crawford County.
A Oh; because there's a major difference. I mean we made a significant cut in 2002 at the behest of the control unit, which would have implications for all of the counties.
Q But, Judge, I'm asking specifically during the fall of 2001, --

with that deal. But yeah, it's getting pretty high. No question.

Q So maybe there was a little "flesh on the bones" during 2001 and 2002 and 2003 that could have been pared down a little more under the annuity insurance buyout line item.

MR. KIENBAUM: Your Honor, I object. That's pure argument. Obviously if you define "flesh on the bone" as a benefit that you can take away -- and you certainly can take everything away -- then that redefines the whole process. I mean what are we doing? This is an argument with the witness, whether that's the bone or not. Are we going to go into all the benefits? If you take a week's vacation away, then you're cutting -- you know, in the bone or not. I mean -- I think it's all before the Court and I don't think we need to argue that much with witnesses anymore. I --

THE COURT: Well, obviously each side's got a slightly different perspective, so I expect the questions to reflect that perspective --

THE WITNESS: Well, I'll just say this to you.

THE COURT: -- and I'll sort it out later. Let's keep going.

THE WITNESS: It was -- it was there. You've identified it. Was it possible? Yes, it was. There were a number of different things that were laid on the table

during the course of the summer as trades, adjustments: age qualifications, this, that, the other thing; and that was one that was not ultimately required as a deal. And so it -- it didn't get cut.

MS. TOSKEY: I have no further questions. Thank you.

MR. KIENBAUM: Just a couple, your Honor. And I do want to note one thing: I think counsel characterized as a $2600 savings on Exhibit 80 as a result of misreading what it said; namely, the point on item 7 is the suggestion by someone that you might switch to a hundred dollars per pay period, which would come out to $2600; and the savings, of course, would be whatever the difference of that is to the one-half of the then pertaining premium. Which we don't have in the record at the moment, but whatever it is it would be. But I don't think counsel intended to do that, but it came across I -- I think as --

THE WITNESS: Thank you. I didn't read that carefully, I guess.

REDIRECT EXAMINATION

BY MR. KIENBAUM:

Q Judge Davis, I'm -- I'm going to ask you to turn back to the book with -- the black book, the defendant's book, tab 13, which has been identified as Defendant's Exhibit 238. And I'm going to ask you to turn back to page two of -- of

was being put in place was there even a greater impact on people who worked in the counties?

A Indeed there was because there was -- there was such diversification in the different health plans because of the different unions and the different counties. Everybody had something different at that time.

Q Now, when Judge Davis made this proposal, how did the court's employees react?

A The court's employees, I believe, were excited and we wanted to do what we could to try to obtain these better benefits, and so we all assented at that meeting that we would be willing to give up those substantial benefits if he were able to increase our benefits to these higher levels.

Q And what did you and the other court employees subsequently learn about whether or not the proposal had been adopted?

A We did learn that all three counties eventually had adopted that, and we -- our -- our co-pays, our longevity, as well as our contribution through our annual raises was already in place too. And we assumed that the benefits were there and we were happy about that.

Q Okay. Now as time has gone by, what you have seen happen is that the half percent out of the four percent has not been there in your paycheck, and the longevity pay has been phased out and you don't anticipate any this year.

existed at the time of that August 28th meeting, I believe you identified certain issues and questions were raised. Do you recall that?

A Yes, ma'am.

Q Under all of those facts and circumstances, why did you also want a written contract?

A I wanted a written contract because there was so many issues that were discussed, and to insure that all the issues that were discussed were addressed at -- I thought it had to be in the form of a contract.

(Ms. Toskey and Mr. McNulty conferring)

Q To what extent, if at all, did there remain open questions and issues that had been unaddressed by the end of that August 28th tri-council meeting?

A To what extent?

Q To what extent?

A Well, there was numerous issues and -- and the only way that it would be clear and concise was -- would be to reduce it in writing in the form of a contract.

Q Was there any sort of vote taken by the members in attendance at that August 28th, 2000 meeting --

A No, ma'am.

Q -- on any of the issues?

A No, ma'am.

Q Now, the Crawford board then held a special meeting of its